Juaramedic Sdn Bhd v MRCB Engineering Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCVC-148–10 OF 2016
NANTHA BALAN J
24 MARCH 2017

Arbitration — Stay of court proceedings — Application — Respondent applied for stay of proceedings pending reference of dispute to arbitration — Whether cl 67 of main agreement related to arbitration between Jabatan Kerja Raya and respondent's holding company had been incorporated to procurement agreement between appellant and respondent — Arbitration Act 2005 s 10

The Government of Malaysia ('the GOM') had accepted the respondent's proposal for the upgrading and repairing work at the Sabah Medical Centre-Queen Elizabeth Hospital II. Consequently, the GOM via Jabatan Kerja Raya ('JKR') and the respondent's holding company, MRCB, entered into a formal agreement ('the main agreement') which contained arbitration clause ie cl 67. In addition, the appellant and the respondent had entered into the procurement agreement whereby the appellant was appointed by the respondent to procure, supply, install and commission medical and non-medical equipment for the upgrading works. Dispute arose between the appellant and the respondent which resulted in the filing of writ and statement of claim dated 3 August 2016 in the sessions court. Subsequently, the respondent applied for stay of the proceedings pending reference of the dispute to arbitration. The learned sessions court judge allowed the respondent's application for a stay pursuant to s 10 of the Arbitration Act 2005, hence the present appeal. The sole issue for determination was whether cl 67 of the main agreement related to arbitration had been incorporated into the procurement agreement.

Held, dismissing the appeal with costs of RM3,000 subject to 4% allocator:

(1) In *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625, the Federal Court held that there is no need for the arbitration agreement to be explicitly referred to. Thus, the appellant's argument that the arbitration agreement was not specifically identified in recital 4 of the procurement agreement was untenable. It was clear in the order that, for there to be an arbitration agreement, it must be shown that such agreement existed and parties had agreed to it. The court was of the view that cl 67 of the main agreement was unquestionably a valid arbitration agreement (see paras 31–32).

(2) Even though there was some doubt as to whether the arbitration agreement namely cl 67 of the main agreement had been incorporated by reference into the procurement agreement, the court should 'lean towards arbitration' and let the parties take up the challenge to jurisdiction afresh in the arbitration proceedings itself (see para 39).

[Bahasa Malaysia summary

Kerajaan Malaysia ('KM') telah menerima cadangan responden untuk kerja-kerja penambahbaikan dan pembaikan di Sabah Medical Centre-Queen Elizabeth Hospital II. Berikutan itu, KM melalui Jabatan Kerja Raya ('JKR') dan syarikat pemegangan responden, MRCB, telah memasuki perjanjian rasmi ('perjanjian utama') yang mengandungi fasal timbang tara iaitu fasal 67. Tambahan pula, perayu dan responden telah memasuki perjanjian perolehan di mana perayu telah dilantik oleh responden untuk memperoleh, membekal, memasang dan mengkomisian peralatan perubatan dan bukan perubatan untuk kerja-kerja penambaikan. Pertikaian timbul antara perayu dan responden yang mengakibatkan dalam pemfailan writ dan penyataan tuntutan bertarikh 3 Ogos 2016 di mahkamah sesyen. Berikutan itu, responden memohon untuk penggantungan prosiding sementara menunggu rujukan pertikaian kepada timbang tara. Hakim mahkamah sesyen yang bijaksana telah membenarkan permohonan responden untuk penggantungan menurut s 10 Akta Timbang Tara 2005, justeru rayuan ini. Satu-satunya isu untuk ditentukan adalah sama ada fasal 67 perjanjian utama berkaitan timbang tara telah dimasukkan ke dalam perjanjian perolehan.

Diputuskan, menolak rayuan dengan kos RM3,000 tertakluk kepada 4% alokator:

(1) Dalam kes *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625, Mahkamah Persekutuan memutuskan bahawa tiada keperluan untuk perjanjian timbang tara dirujuk secara eksplisit. Oleh itu, hujah perayu bahawa perjanjian timbang tara tidak spesifik dikenalpasti dalam resital 4 perjanjian perolehan adalah tidak dapat dipertahankan. Ia adalah jelas dalam perintah tersebut bahawa, untuk adanya perjanjian timbang tara, ia perlu ditunjukkan bahawa perjanjian tersebut wujud dan pihak-pihak bersetuju dengannya. Mahkamah berpendapat bahawa fasal 67 perjanjian utama tidak dapat disangkal lagi adalah satu perjanjian timbang tara yang sah (lihat perenggan 31–32).

(2) Walaupun terdapat beberapa keraguan berhubung sama ada perjanjian timbang tara terutamanya fasal 67 perjanjian utama telah dimasukkan sebagai rujukan ke dalam perjanjian perolehan, mahkamah patut 'lean towards arbitration' dan membenarkan pihak-pihak mencabar bidang kuasa baru dalam prosiding timbang tara itu sendiri (lihat perenggan 39).]

Notes

For cases on application, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2185–2186.

Cases referred to

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625, FC (refd)

PLB-KH Bina Sdn Bhd v Hunza Trading Sdn Bhd [2014] MLJU 1427; [2014] 1 LNS 1074, CA (refd)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (folld)

TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857, CA (folld)

Legislation referred to

Arbitration Act 2005 ss 9, 9(5), 10, 10(1), 18(1)

Andrew Ewe (Ewe Woong & Khoo) for the appellant.

Faisal Moideen (Nereen Kaur Veriah with him) (Moideen & Max) for the respondent.

Nantha Balan J:

INTRODUCTION

[1] These are my grounds of judgment in respect of an appeal by the appellant/plaintiff, against the decision of the sessions court on 18 October 2016 allowing the respondent/defendant's application and granting a stay of the proceedings pending reference of the dispute to arbitration. For convenience, I shall refer to the parties as per their original tides, that is, as plaintiff and defendant respectively. The record of appeal shall be referred to as 'RA'.

[2] The plaintiff is a private limited corporation which provides technical and technological related solutions to healthcare facilities in the region. Their core activities are in medical equipment planning and medical asset management. The defendant is a private limited corporation which provides engineering services. Their core activities include, inter alia, the construction of commercial buildings and hospitals. The defendant is a wholly owned subsidiary of Malaysian Resources Corp Bhd ('MRCB').

[3] The brief background facts leading to the filing of this appeal are as follows:

(a) by way of a letter of acceptance dated 31 May 2010 ('letter of acceptance'), the Government of Malaysia had accepted the defendant's proposal for the upgrading and repairing work at the Sabah Medical Centre-Queen Elizabeth Hospital II ('the project'); A

(b) consequently, the Government of Malaysia via Jabatan Kerja Raya ('JKR') and the defendant's holding company, MRCB, entered into a formal agreement dated 18 November 2010 ('the main agreement'). The main agreement contains an arbitration clause (ie cl 67); B

(c) in the meanwhile, after the issuance of the letter of acceptance, the defendant and the plaintiff entered into an agreement called procurement, supply, installation and commissioning agreement dated 30 October 2010 ('the procurement agreement'); and C

(d) pursuant to the procurement agreement the defendant had appointed the plaintiff to procure, supply, install and commission medical and non medical equipment for the upgrading works under the project for a contract sum of RM13,174,382 ('the contract value'). D

[4] The arbitration clause which is the subject matter of this appeal is cl 67 of the main agreement and it reads as follows: E

67.0 ARBITRATION

67.1 If any dispute or difference shall arise between the Government and the Contractor out of or in connection with the contract then the parties shall refer such matter, dispute or difference to the officer named in Appendix 1 for a decision. F

67.2 The decision of the officer named in Appendix 1 shall be in writing and shall subject to clause 67.4 be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.

67.3 If the parties — G

(a) fall to receive a decision from the officer named in Appendix 1 within forty five (45) days after being requested to do so; or

(b) are dissatisfied with any decision of the officer named in Appendix 1. H

then such dispute or difference shall be referred to arbitration within forty-five days to an arbitrator to be agreed between the parties and failing such agreement, to be appointed by the Director of the Regional Centre for arbitration in Kuala Lumpur on the application of either party hereto. Such arbitration shall be heard at the Kuala Lumpur Regional Centre for Arbitration and shall be conducted in accordance with the rules for arbitration of the Kuala Lumpur Regional Centre for Arbitration using the facilities and the systern available at the Centre. I

67.4 Such reference, except on any difference or dispute under clause 66 shall not be commenced until after the completion or alleged completion of the Works or determination or alleged determination of the Contractor's employment under this

Contract, or abandonment of the Works, unless with the written consent of the Government and the Contractor.

67.5 In the event that such consent has been obtained in accordance with clause 67.4, the reference of any matter, dispute or difference to arbitration pursuant to this clause and/or the continuance of any arbitration proceedings consequent thereto shall in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this Contract.

67.6 In any arbitration proceedings conducted pursuant to clause.

67.3, the parties may make any counter claim in relation to any dispute or difference arising from the Contract.

67.7 The arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given in accordance with clause 67.3 aforesaid; In the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

67.8 Upon every or any such reference the costs of such incidental to the reference and award shall be in the discretion of the Arbitrator who may determine the amount thereof, or direct the amount to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same be borne, award and paid.

67.9 The award of the Arbitrator shall be final and binding on the parties.

67.10 In the event of the death of the arbitrator or his unwillingness or inability to act, then the Government and the Contractor upon agreement shall appoint another person to act as the arbitrator, and in the event the Government and the Contractor fail to agree on the appointment of an arbitrator, an arbitrator shall be appointed by the Director of the Regional Centre for Arbitration in Kuala Lumpur.

67.11 In this clause, 'reference' shall be deemed to be reference to arbitration within the meaning of the Arbitration Act 2005.

67.12 The arbitration shall be governed by the Arbitration Act 2005 and the laws of Malaysia.

[5] At the outset, it may be noted that although the main agreement is dated 18 November 2010, the procurement agreement dated 30 October 2010 which is dated earlier, nevertheless makes reference to the main agreement which is dated about 18 days after the procurement agreement was executed/dated. But nothing really turns on this aspect of the two agreements as it is common ground that the procurement agreement unequivocally makes reference to the main agreement.

[6] The sole question in this appeal is whether cl 67 of the main agreement has been incorporated into the procurement agreement. The defendant's firm position in this regard is that the procurement agreement makes specific

reference to the main agreement and the terms and conditions of the main agreement are accordingly incorporated into the procurement agreement such that the plaintiff is bound by the terms of the main agreement, inclusive of the arbitration clause.

[7] On that analysis, the defendant contends that the plaintiff is bound by the arbitration clause contained in the main agreement. Hence, the defendant contends that any dispute between the plaintiff and the defendant arising out of the procurement agreement ought to be referred to arbitration.

[8] There is no doubt that there was a dispute between the plaintiff and the defendant, which resulted in the filing of the writ and statement of claim dated 3 August 2016 in the sessions court, wherein the plaintiff has claimed for alleged non-payment of the retention sum amounting to RM658,719 and a further sum of RM35,550 for the purported costs for repairing an operation table or in the alternative, a claim based on quantum meruit for the sum of RM35,550.

[9] On the other hand, the plaintiff contends that they are not a party to the main agreement and that the parties to the main agreement are not themselves parties to the procurement agreement. The plaintiff relied on the Court of Appeal case of *PLB-KH Bina Sdn Bhd v Hunza Trading Sdn Bhd* [2014] MLJU 1427; [2014] 1 LNS 1074 ('*Hunza*'s case'), which also concerned a main contract (between the employer and the main contractor) which had an arbitration clause and a separate supply contract (between the main contractor and Hunza Trading) ('the supply contract'). In that case, Hunza Trading was related to the employer. Hunza Trading was the supplier and the sued the main contractor.

[10] In resisting a claim by Hunza Trading, the main contractor sought to stay the matter pending reference to arbitration by importing the arbitration clause from the main contract into the supply contract. In *Hunza*'s case, although the main contract and supply contract were in relation to the same project, the Court of Appeal unanimously held that:

(a) in general, so long as parties to the relevant contracts are the same, and such contracts related to a single project, courts are generally willing to hold that an arbitration clause in one agreement extends to related agreements;

(b) although Hunza Trading Sdn Bhd was a related company to that of the employer, the parties to the main contract and the supply contract were still deemed to be different; and

(c) because no fraud was asserted by the main contractor, the Court of Appeal found no reason to disregard corporate independence between the employer and Hunza Trading Sdn Bhd.

[11] Thus, counsel for the plaintiff argued that the principle elucidated from *Hunza*'s case is applicable to the present case and submitted that the plaintiff in this case stands on better footing because, even if the defendant and MRCB are deemed to be the same parties, the fact remains that JKR and the plaintiff are not. In the present case, it was argued that the parties to the main agreement and the procurement agreement are different. Hence, it was argued that the court should not import an arbitration clause from one agreement to another in circumstances such as this.

[12] The obvious starting point in the discussion with regards to incorporation of the terms and conditions of the main agreement into the procurement agreement is recital 4 of the procurement agreement ('recital 4'). It reads as follows:

> The Seller (the Plaintiff) further acknowledges that it has read the terms and conditions of the Main Contract between the Buyer and the Employer [which pricing and relevant details has been deleted] and agrees that it shall observe, perform and comply with all the provisions of the Main Contract including the General Conditions of Contract on the part of the Buyer to be observed, performed and complied with so far as they related and apply to this Agreement [or any portion of the same' save as expressly provided otherwise in this Agreement. The Seller agrees that Goods must be approved and accepted by the Employer.
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> (See: p 130 RA.)

[13] According to the plaintiff, recital 4 in reference to the main agreement merely utilises general words referencing to the terms and conditions of the main agreement. It was emphasised that recital 4 makes no specific reference to the arbitration clause in the main agreement.

[14] Counsel for the plaintiff also focussed on the following words in recital 4, '... save as expressly provided otherwise in this Agreement' and submitted that these words exclude any importation of terms from the main agreement if they have already been provided for and/or are in conflict with those already provided for in the procurement agreement. In this case, counsel referred to cl 21.2 of procurement agreement which is an exclusive jurisdiction clause concerning disputes arising under the procurement agreement. It reads as follows:

> Clause 21.2 on Applicable Law
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> In the event of a dispute, discrepancies, controversies and/or inconsistencies arising out of or in connection with this Agreement, the Parties hereto agree to submit

themselves to the *exclusive jurisdiction of the courts of Malaysia*. (Emphasis added.) (See: p 139 RA.)

[15] For the defendant it was submitted that there is a valid and binding arbitration agreement between the parties and that the main agreement and the procurement agreement ought to be read together harmoniously and interpreted as a whole. Further, it was submitted that the arbitration clause in the main agreement has been properly incorporated into the procurement agreement, and the parties are therefore bound by arbitration agreement. Hence, it was urged upon this court that the dispute ought to be referred to an arbitral tribunal.

[16] Counsel for the defendant submitted that the procurement agreement makes specific reference to the main agreement, which can be seen at recital 4 of the procurement agreement (see p 92 RA) and that there is no legal requirement for the arbitration clause to be specifically referred to. In this regard, counsel for the defendant referred to the Federal Court case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 (FC) where the court enunciated that under s 9(5) of the Arbitration Act 2005 (at p 638 of the judgment), *parties may instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration clause.*

[17] According to the Federal Court, the document referred to *need not even be signed by the parties* and *no explicit reference to arbitration clause contained therein is required*. The Court of Appeal in the case of *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857 also took the same view (at p 867).

[18] Thus, counsel for the defendant submitted that based on the legal authorities above, the document containing the arbitration clause (in this case, the main agreement) need not even be signed by either party and that s 9(5) of the Arbitration Act 2005 merely requires that the arbitration agreement be in writing and the reference is such as to make that clause part of the agreement. Hence, it was argued for the defendant that the main agreement containing an arbitration agreement has been specifically referred to in recital 4 and the plaintiff has agreed to 'observe, perform and comply with all the provisions of the main agreement'.

[19] Accordingly, it was submitted that the procurement agreement incorporated the main agreement (which contains an arbitration clause) and therefore, satisfies the requirement of s 9(5) of the Arbitration Act 2005.

[20] Counsel for the defendant submitted that s 10 of the Arbitration Act 2015 requires the Court to make a determination whether the proceedings that were commenced by the plaintiff are 'brought in respect of a matter which is the subject matter of an arbitration agreement'. Here, it was submitted that the plaintiff's claim is in respect of a matter which is the subject matter of the arbitration agreement. The arbitration clause provides for 'any dispute or derence ... out of or in connection with the contract' and as such, it is wide enough to encapsulate the plaintiff's claim, which is in connection with the main agreement. Counsel for the defendant submitted that the procurement agreement is an extension of the main agreement and that any dispute in respect of the procurement agreement is in connection with the main agreement. Thus, it was submitted that both the contracts ought to be looked at in total and be read harmoniously, to give effect to the Arbitration Act 2005 and the arbitration clause.

[21] As for cl 21 of the procurement agreement which provides that the parties have also agreed to submit to the exclusive jurisdiction of the Courts of Malaysia in the event of dispute, it was submitted for the defendant that cl 21 only applies in the event of a dispute in respect of the interpretation of the procurement agreement and it does not affect the substance of the plaintiff's dispute herein which concerns the works carried out under the procurement agreement which directly relates to the main agreement.

[22] Ultimately, the learned sessions court judge agreed with the defendant and allowed the defendant's application for a stay pursuant to s 10 of the Arbitration Act 2005. Hence, the appeal by the plaintiff.

ANALYSIS AND CONCLUSION

[23] I start by observing that there is no doubt that the parties to the main agreement are the Government of Malaysia (JKR) and MRCB, whereas the parties to the procurement agreement are the plaintiff (seller) and defendant (buyer). The arbitration agreement (cl 67) (pp 118–119 RA) is contained in the main agreement. However, unlike *Hunza*'s case, I find that the present case presents a more convincing argument for 'incorporation by reference'.

[24] In *Hunza*'s case, the main contractor's contract with the employer contained an arbitration agreement and the direct contractual nexus between the main contractor (PLB-KH Bina Sdn Bhd) and the supplier (Hunza Trading Sdn Bhd) was a document called 'Nomination Confirmation Letter' which did not contain an arbitration agreement nor did it import the terms and conditions of the main contract into the nomination letter of confirmation.

[25] Of course, in that case the Court of Appeal also alluded to the fact that

the parties to the two contracts were different (see: paras [35] and [36] of the judgment). But the question ultimately in that case was whether the arbitration clause in the main contract was binding and 'by reference', had become part of the contract.

[26] For my part, I do not read the *Hunza*'s case as establishing an inflexible principle that an arbitration clause contained in a separate document signed between different parties can never be binding on parties to another contract.

[27] In my view, it all depends on the wordings of the other contract. Here, recital 4 of the procurement agreement clearly makes reference to the main agreement and incorporates the terms and conditions contained therein with the qualification, 'same as expressly provided otherwise in this agreement' (p 130 AR).

[28] In the present case, counsel for the plaintiff referred to cl 21.2 of the procurement agreement and contended that the words, 'In the event of a dispute', clearly indicates that the parties had intended that the disputes arising out of the procurement agreement should be dealt with in the ordinary way by court action and not via arbitration as per cl 67 of the main agreement.

[29] In my view, the wording of the procurement agreement are rather unhappily worded and this has given rise to a real doubt as to whether parties had intended that the dispute arising between the plaintiff and defendant should be arbitrated or be litigated via court action.

[30] Here, it must be borne in mind that the dispute is intrinsically connected with the main agreement and so it is true to say that the procurement agreement is but an extension of the main agreement. But this does not help us arrive at a definite conclusion one way or another as to whether cl 67 of the main agreement was incorporated by reference into the procurement agreement.

[31] Indeed, in *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 (FC), the Federal Court held that there is no need for the arbitration agreement to be explicitly referred to. And so the argument by the plaintiff that the arbitration agreement was not specifically identified in recital 4 of the procurement agreement is untenable.

[32] It is clear that in order for there to be an arbitration agreement, it must be shown that such an agreement exists and parties had agreed to it (see: s 10 of the Arbitration Act 2005). In my view, cl 67 is unquestionably a valid arbitration agreement.

[33] The only question is whether the arbitration agreement forms part of the contract between the plaintiff and defendant, so as to constitute an arbitration agreement by incorporation or reference as per s 9 of the Arbitration Act 2005, which reads as follows:

9 Definition and form of arbitration agreement

(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in:–

(a) a document signed by the parties

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) *A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.* (Emphasis added.)

[34] I now turn to the question as to the forum for determination of the question as to whether the arbitration agreement (cl 67 of the main agreement) has been incorporated into the procurement agreement. Here, it must be borne in mind that it is the arbitration agreement which ultimately gives rise to the jurisdiction of the arbitrators. But, in so far as determining the jurisdiction of the arbitration tribunal is concerned, it is clear that s 18(1) of the Arbitration Act 2005, gives the arbitrators, power and jurisdiction to determine their own jurisdiction pursuant to the principle of 'Kompetenz-Kompetenz'. Section 18(1) of the Arbitration Act 2005 reads as:

18 Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

[35] Thus, there is presently a doubt as to whether cl 67 of the main agreement forms part of the contract between the plaintiff and defendant and the imperative question is whether in light of the doubt, the matter should in

any event be referred to arbitration. Here, I find that this difficult issue was dealt with and answered in the case of *TNB Fuel Services* case where the Court of Appeal had unmistakably enunciated that even if the court had '*doubts*' concerning the existence of the 'arbitration agreement', *the court should lean in favour granting a stay so that the dispute may be referred to arbitration and let* the arbitrators decide whether they have jurisdiction to arbitrate the dispute.

[36] Therefore, in my view the present doubt as regards the applicability of cl 67 of the main agreement is to be resolved by following the approach taken by the Court of Appeal in *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857 (CA) at paras [14] and [24], and by the Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1 (FC) at paras [33]–[41] . The cumulative effect of both these cases is that the court should 'lean' towards arbitration and leave it to the arbitrators to determine under the purview of s 18 of the Arbitration Act 2005, whether or not the arbitration agreement applies to the procurement agreement such as to give rise to the arbitrators jurisdiction. The relevant paragraphs from the *TNB Fuel Services* case are [21] and [24] and they read as follows:

> [21] With respect, in our judgment, the learned trial judge erred in not considering the application for the injunction on the basis of sub-s 9(5) of the Arbitration Act 2005. The fact of the matter is that the exchange of documents between the parties which included: the bid form and supporting bid bond from the respondent, the letter of award by the appellant and the letter from the respondent confirming acceptance of the terms in the letter of award constitutes the requisite offer and acceptance thereby creating a binding contract. This contract, in turn, incorporated the terms of the unsigned coal purchase contract thereby incorporating by reference the 'arbitration agreement' in this document. Against these background facts, in our judgment, if the learned trial judge had applied s 9(5) of the Act to these facts, we are of the considered opinion that Her Ladyship would have come to the conclusion that the 'arbitration agreement' was binding on the parties. In any event, in our opinion, even if Her Ladyship entertained any doubts concerning the existence of the 'arbitration agreement', Her Ladyship ought to have leaned in favour of refusing the injunction so as to enable this jurisdictional issue to be determined by the arbitral tribunal following the pronouncements of the court in the authorities of *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* and *CMS Energy Sdn Bhd v Poscon Corp* and the passage in the book of *Malaysian Arbitration Act 2005* by Sundra Rajoo and WSW Davidson recited in paras 11, 14 and 13 respectively in this judgment.
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> ...
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> [24] The present form of s 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1 July 2011 (Act A1395). It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The court is no longer required to delve into the facts of the dispute when considering an

application for stay. Indeed, following the decision of the court in *CMS Energy Sdn Bhd v Poscon Corp*, *a court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the court is in some doubt about the validity of the 'arbitration agreement'*. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal. In this respect, we pause to observe that even the Singapore Court of Appeal in a very recent decision opined as follows on the question of stay:

> ... Woo J was quick to add this important caveat that *if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered*. We agree with the measured approach taken by Woo J since the question of whether a matter is the subject of an arbitration agreement is the very threshold to the application of s 6 of the IAA itself. However, *it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement*.

(See the case of *Tjong Very Sumito and others v Antig Investments Ptd Ltd* [2009] 4 SLR 732).

For the reasons contained herein and the provisions of s 8 of the 2005 Act which states that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', we allowed both appeals. The order of the High Court granting the injunction restraining the appellant from proceeding with the arbitration proceedings is hereby set aside. The order of the High Court refusing a stay of the pending arbitration proceedings is hereby set aside. We hereby order further proceedings in Originating Summons No 24–1925 of 2011 be stayed pursuant to s 10 of the Arbitration Act 2005. The respondent is hereby ordered to pay costs of RM15,000 as costs here and below to the appellant in respect of both appeals. The deposit is hereby refunded to the appellant. (Emphasis added.)

[37] In this regard, reference should also be made to the decision of the Federal Court in *Press Metal* case at p 427 para [24] and to the *TNB Fuel Services* case at para [40] where it was held that a challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself and not during the hearing of an application for stay under s 10(1) of the Arbitration Act 2005. The relevant paragraphs from the judgment of the Federal Court in the *Press Metal* case reads as follows:

> [24] The defendant also submitted that, except where the arbitration clause was found to be null and void, inoperative and inapplicable, a court should not enquire into the facts of the dispute in question and should instead stay the proceedings and leave the arbitrator to determine the question of its own jurisdiction, which included whether or not a dispute fell within the scope or ambit of the arbitration clause. To support this submission two authorities were cited by the defendant, namely, *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857; [2013] 1 LNS 288 and *Tjong Very Sumito and Ors v Antig Investments Pte Ltd* [2009] SGCA 41.

[38] And para 40 of the *TNB Fuel Services* case reads as:

> [40] A challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself, but not at the court hearing an application for a stay under s 10(1) (see s 18(5)). It is the arbitrator who decides the issue of jurisdiction. Any ruling of the arbitrator that it has jurisdiction, can be appealed to the High Court which will finally decide the matter (see s 18(8)).

[39] In the result, taking into account the principles of law which enjoins this court to lean in favour of arbitration and having regard to the clear statutory power and jurisdiction of the arbitrators to rule on their own jurisdiction, which will encompass the question as to whether there is in existence an arbitration agreement (as defined in s 9 of the Arbitration Act 2005) vis a vis the procurement agreement, I am of the view that even though there is some doubt as to whether the arbitration agreement namely cl 67 of the main agreement has been incorporated by reference into the procurement agreement, this court should 'lean towards arbitration' and let parties take up the challenge to jurisdiction afresh in the arbitration proceedings itself. Hence, by a somewhat different analytical route, I am upholding the decision of the sessions court dated 18 October 2016 and hereby dismissed the appeal with costs of RM3,000 (subject to 4% allocatur) which is to be costs in the cause of the arbitration.

Order accordingly.

Appeal dismissed with costs of RM3,000 subject to 4% allocator.

Reported by Dzulqarnain Ab Fatar